

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 6, 2002 Session

**RICHARD HOOPER, ET AL. v. RONALD MOSER**

**Appeal from the Circuit Court for Davidson County  
No. 01C-705     Thomas W. Brothers, Judge**

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**No. M2001-02702-COA-R3-CV - Filed October 22, 2003**

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This appeal involves the aftermath of the revelation of a long-kept secret regarding the parentage of a 28-year-old woman. When the woman discovered that the man who had raised her was not her biological father, she and her now stepfather filed suit in the Circuit Court for Davidson County against the person her mother identified as her biological father, seeking confirmation of her parentage and compensatory and punitive damages. The trial court dismissed the damage claims after court-ordered genetic testing confirmed that the defendant was the woman's biological father. The stepfather has appealed. We have concluded that the stepfather's damage claims should have been dismissed even though we do not subscribe to the trial court's reasoning.<sup>1</sup> He has failed to demonstrate that he will be able to prove all the essential elements of his fraud or misrepresentation claim, and his implied contract claim is barred by the statute of repose in Tenn. Code Ann. § 36-2-306(a) (2001).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and D. MICHAEL SWINEY, J., joined.

Charles Galbreath, Nashville, Tennessee, for the appellant, Richard Hooper.

John P. Brown, III, Nashville, Tennessee, for the appellee, Ronald Moser.

**OPINION**

**I.**

Richard and Faye Hooper were married in the early 1970s. Unbeknownst to Mr. Hooper, Ms. Hooper had an extramarital affair with a co-worker named Ronald Moser. When Dana Hooper was

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<sup>1</sup>The Court of Appeals may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999); *Allen v. National Bank of Newport*, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992); *Clark v. Metropolitan Gov't*, 827 S.W.2d 312, 317 (Tenn. Ct. App. 1991).

born approximately nine months later in 1972 or 1973, Mr. Hooper assumed that she was his daughter. As far as this record shows, Faye Hooper hid her marital indiscretions from Mr. Hooper and did nothing to cause him to question whether Dana Hooper was his child. Dana Hooper grew to adulthood believing that Mr. Hooper was her biological father, and during all this time, Mr. Hooper believed that Dana Hooper was his biological daughter.

For some reason not evident in this record, Mr. Hooper and Dana Hooper became suspicious about Dana Hooper's parentage in late 2000. They confronted Faye Hooper in late 2000, after genetic testing conclusively established that Mr. Hooper was not Dana Hooper's biological father. Faye Hooper revealed her affair with Mr. Moser. Even though she had not communicated with Mr. Moser for over twenty years, Faye Hooper also contacted Mr. Moser to tell him for the first time that he was probably Dana Hooper's biological father.

Dana Hooper and Mr. Hooper retained a lawyer who began sending letters to Mr. Moser demanding that he submit to genetic testing. When Mr. Moser did not respond to their satisfaction, Mr. Hooper and Dana Hooper sued Mr. Moser in the Circuit Court for Davidson County. Dana Hooper requested that Mr. Moser be ordered to submit to genetic testing and requested damages for "humiliation and anxiety."<sup>2</sup> Mr. Hooper sought to recover \$1,000,000 in compensatory and punitive damages. Dana Hooper was twenty-eight years old when the complaint was filed.

Mr. Moser moved to dismiss the complaint in April 2001. Before addressing Mr. Moser's motion, the trial court directed him to have genetic testing. In June 2001, the test results confirmed that Mr. Moser was Dana Hooper's biological father. Thereafter, the trial court converted Mr. Moser's motion to a motion for summary judgment and dismissed the complaint because it failed to "set forth sufficient facts to state a cause of action for fraud and misrepresentation."<sup>3</sup>

Mr. Hooper and Dana Hooper moved to "alter or clarify" the judgment and offered to file an amended complaint containing a more specific fraud and misrepresentation claim against Mr. Moser. Mr. Moser opposed the motion but also stated that he would reimburse Mr. Hooper for the cost of the paternity test. The trial court adhered to its dismissal of the damage claims but determined that the costs should be taxed against Mr. Moser because Dana Hooper had prevailed on her request to establish parentage. Both Mr. Hooper and Dana Hooper filed a notice of appeal. However, Dana Hooper appears to have abandoned her damage claim because the brief filed with this court on Mr. Hooper's behalf focuses solely on his claims.

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<sup>2</sup>Dana Hooper apparently abandoned her damage claims as the litigation progressed.

<sup>3</sup>The trial court concluded that Mr. Hooper could recover from Mr. Moser if he could "state a cause of action for fraud and misrepresentation." The court based its decision on *Henson v. Sorrell*, No. 02A01-9711-CV-00291, 1999 WL 5630 (Tenn. Ct. App. Jan. 8, 1999), *perm. app. denied concurring in results only* (Tenn. June 28, 1999). The trial court erred by relying on *Henson v. Sorrell* because the Tennessee Supreme Court had explicitly disapproved the decision. The opinion cannot be "cited by any judge in any trial or appellate court decision, or by any litigant in any brief, or other material presented to any court." Tenn. S. Ct. R. 4(F)(2).

## II. MR. HOOPER'S FRAUD AND MISREPRESENTATION CLAIM

A number of courts around the country have addressed the viability of “sexual fraud” claims typically made by biological fathers seeking to avoid their obligation to support their children. The courts have consistently rejected these claims on policy and privacy grounds. *See, e.g., Welzenbach v. Powers*, 660 A.2d 1133, 1136 (N.H. 1995); *C.A.M. v. R.A.W.*, 568 A.2d 556, 563 (N.J. Super. Ct. App. Div. 1990); *Wallis v. Smith*, 22 P.3d 682, 685 (N.M. Ct. App. 2001); *Jose F. v. Pat M.*, 586 N.Y.S.2d 734, 736 (N.Y. Sup. Ct. 1992). Mr. Hooper’s complaint in this case differs from the typical sexual fraud claim. He is not seeking to avoid a legal obligation of parenthood but rather to recover his expenses to support another man’s child. This difference has legal significance and prevents us from dismissing Mr. Hooper’s tort claim on the same grounds used to dispose of sexual fraud claims.

Mr. Hooper’s tort claim has taken on a chameleon-like quality. In his complaint, he invoked the “tort of fornication” which he characterized as “deceitful, wrongful and negligent.” After Mr. Moser questioned whether the act of fornication was tortious, Mr. Hooper characterized his claim as a negligence action, specifically the negligent “failure . . . to practice birth control while fornicating.” Later, relying on a strained reading of *Henson v. Sorrell*,<sup>4</sup> he characterized his claim as one for “fraud, deceit and misrepresentation.”<sup>5</sup> The unfocused arguments in Mr. Hooper’s brief obscure the current foundation of his tort claim. For the purpose of this opinion, we will presume that his tort claim continues to be based solely on fraud and misrepresentation because now he asks us only to determine whether Mr. Moser is “guilty of some form of fraud and misrepresentation.”<sup>6</sup>

To succeed with a fraud or misrepresentation claim, a plaintiff must prove that the defendant either misrepresented a material fact or failed to disclose a material fact that he or she had a duty to disclose. *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d 535, 538-39 (Tenn. 1998). Mr. Hooper’s complaint contains no allegation that Mr. Moser made any representations to him regarding the parentage of Dana Hooper. Accordingly, Mr. Hooper’s tort claim can succeed only if he can prove that Mr. Moser knew that Dana Hooper was his biological child and failed to disclose it to Mr. Hooper.<sup>7</sup> Mr. Hooper’s claim

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<sup>4</sup>We have already pointed out that Mr. Hooper’s lawyer violated Tenn. S. Ct. R. 4(F)(2) by citing *Henson v. Sorrell* to the trial court and to this court.

<sup>5</sup>After the trial court dismissed his complaint, Mr. Hooper asserted in his motion to “alter or clarify” the judgment that “[c]ounsel for the plaintiffs intended to, as he thought he did, allege that the defendant was guilty of fraud and misrepresentation.” He also stated that “[i]f the Court declines to alter its judgment so as to grant the plaintiffs the right to present their evidence of damages they will move to amend so as to make clear that they relied on fraud, deceit and misrepresentation as grounds for the relief sought . . .”

<sup>6</sup>Accordingly, we decline to address Mr. Hooper’s earlier claims based on the “tort of fornication” or the negligent failure to practice birth control while fornicating because he has effectively abandoned them.

<sup>7</sup>Liability cannot arise simply because Mr. Moser did not disclose that he was having an extra-marital affair with Faye Hooper. The law has never recognized that a spouse’s paramour has a duty to disclose the infidelity to the betrayed spouse. In addition, the damages Mr. Hooper is seeking in this case were not caused by the extra-marital affair itself but

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breaks down at this precise point. Mr. Hooper has neither alleged nor demonstrated that he can prove that Mr. Moser knew that Dana Hooper had been born or that he knew or should have known that he was Dana Hooper's biological father.

A summary judgment is appropriate when a plaintiff fails to demonstrate an ability to prove an essential element of his or her case at trial. *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Wilson v. Rubin*, 104 S.W.3d 39, 47 (Tenn. Ct. App. 2002). Mr. Hooper has failed to demonstrate that he will be able to prove that Mr. Moser knew that Dana Hooper was his biological daughter or that Mr. Moser failed to disclose this information to Mr. Hooper when he had an obligation to do so. Accordingly, Mr. Moser was entitled to a judgment as a matter of law on Mr. Hooper's fraud and misrepresentation claim.

### III. MR. HOOPER'S "IMPLIED CONTRACT" CLAIM

Mr. Hooper also takes issue with the trial court's dismissal of his "implied contract" claim against Mr. Moser. He asserts that he is entitled to recover the financial support he provided to Dana Hooper prior to her eighteenth birthday and that his claim was timely because he filed it within one year after discovering that he was not her biological father. We have determined that Mr. Hooper's claim was not timely because it was not filed within three years after Dana Hooper's eighteenth birthday as required by Tenn. Code Ann. § 36-2-306(a).

Biological parents and adoptive parents have a moral and legal obligation to support their minor children. Tenn. Code Ann. § 34-1-102(a) (2001); *Boggs v. Boggs*, 520 U.S. 833, 848, 117 S. Ct. 1754, 1764 (1997) (quoting *Rose v. Rose*, 481 U.S. 619, 632, 107 S. Ct. 2029, 2037 (1987)); *State Dep't of Human Servs. ex rel. Young v. Young*, 802 S.W.2d 594, 600 (Tenn. 1990); *Baker v. Baker*, 169 Tenn. 589, 592, 89 S.W.2d 763, 764 (1935); *Wallace v. Cox*, 136 Tenn. 69, 72, 188 S.W. 611, 612 (1916). The obligation can also fall on the spouse of a biological or adoptive parent who willingly assumes all the responsibilities of parenthood knowing that the child is not his or her offspring. *Maguinay v. Saudek*, 37 Tenn. (5 Sneed) 146, 147-48 (1857); *Sanderlin v. Sanderlin's Adm'r*, 31 Tenn. (1 Swan) 441, 444 (1852); *Tyler v. Tyler*, 671 S.W.2d 492, 494 (Tenn. Ct. App. 1984); 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 7.2, at 442 (2d ed. 1987).<sup>8</sup>

When a parent or other person with an obligation to support fails to provide necessary support, a third party may step in and provide the support and then recover from the legally responsible party. The normal procedure for obtaining reimbursement for the payment of a child's

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<sup>7</sup> (...continued)

rather by the birth of Dana Hooper. Accordingly, Mr. Moser's liability can only be predicated on his knowledge that Dana Hooper was born and that he was her biological father.

<sup>8</sup> The relationship between a spouse and the child of the other spouse that will give rise to an obligation to support has traditionally been referred to as "in loco parentis." Technically speaking, Mr. Hooper was not "in loco parentis" with Dana Hooper because he did not voluntarily assume his parental responsibilities knowing that she was not his biological daughter. To the contrary, he took on his parental responsibilities because he believed he was Dana Hooper's biological father.

necessaries is an action against the child's biological or adoptive parents or the persons obligated to support the child. *Cartwright v. Juvenile Court at Nashville*, 172 Tenn. 626, 628, 113 S.W.2d 754, 755 (1938); *State ex rel. Grant v. Prograis*, 979 S.W.2d 594, 601 (Tenn. Ct. App. 1997). To maintain a successful claim for necessities, the plaintiff must prove: (1) that the child needed the particular goods or services that were provided, (2) that the defendant had a legal obligation to provide the goods or services, (3) that the defendant failed to provide the goods or services, and (4) the actual cost of these goods or services.

Lawsuits seeking recovery for the payment of necessities provided to a minor child sound in contract. *Foster v. Adcock*, 161 Tenn. 217, 220, 30 S.W.2d 239, 240 (1930); *State ex rel. Grant v. Prograis*, 979 S.W.2d at 601. Accordingly, these suits must be commenced within six years after the necessities were provided. Tenn. Code Ann. § 28-3-109(a)(3).<sup>9</sup> In cases where the defendant's parentage must also be established, the lawsuit must be filed prior to the child's twenty-first birthday. See Tenn. Code Ann. § 36-2-306(a) (2001) ("[a]n action to establish parentage . . . may be instituted before or after the birth of the child and until three (3) years beyond the child's age of majority.").<sup>10</sup>

Even though persons in Mr. Hooper's circumstances do not have standing to file actions solely to establish parentage under Tenn. Code Ann. § 36-2-305(b)(1), we have determined that the statute of repose in Tenn. Code Ann. § 36-2-306(a) applies to claims like the one involved in this proceeding. The statute of repose in Tenn. Code Ann. § 36-2-306(a) is not expressly limited to actions filed under Tenn. Code Ann. § 36-2-305, and the policy favoring timely and final parentage determinations reflected in Tenn. Code Ann. § 36-2-306(a) applies equally to cases seeking reimbursement for necessities provided to a minor child. No useful purpose is served by permitting these claims to be made on an open-ended basis.

Notwithstanding its heading,<sup>11</sup> Tenn. Code Ann. § 36-2-306(a) is a statute of repose. The principal distinctions between a statute of limitations and a statute of repose are (1) that the triggering event for a statute of repose is usually unrelated to the accrual of a cause of action and, therefore, (2) that a statute of repose may have the effect of barring a claim before it accrues or even before the plaintiff becomes aware of his or her injury. *Cronin v. Howe*, 906 S.W.2d 910, 913 (Tenn. 1995); *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 102 (Tenn. Ct. App. 1995). Thus, statutes of repose define the "outer limits" for filing claims, *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 525 (Tenn. 1981), and the discovery rule used to ascertain when a cause of action accrues for the purposes of a statute of limitations cannot be used to toll the running of a statute of limitations. *Watts v. Putnam County*, 525 S.W.2d 488, 491 (Tenn. 1975); *Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d at 539.

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<sup>9</sup>Other courts have applied the six-year statute of limitations to claims seeking recovery for necessities. *Hafner v. Security Pacific Nat'l Bank*, 517 N.Y.S.2d 398, 401 (N.Y. Sup. Ct. 1987).

<sup>10</sup>Currently, the age of majority in Tennessee is eighteen years of age. Tenn. Code Ann. § 1-3-105(1) (2003). Therefore, three years beyond a child's age of majority would be the child's twenty-first birthday.

<sup>11</sup>When the Tennessee Code Commission codified this statute, it added a heading characterizing it as a "statute of limitations." This section heading is not "part of the law." Tenn. Code Ann. § 1-3-109 (2003). Accordingly, the Commission's decision to codify Tenn. Code Ann. § 36-2-306(a) as a "statute of limitations" is of no legal consequence.

Even if the discovery rule could have saved Mr. Hooper's claim from the six-year statute of limitations in Tenn. Code Ann. § 28-3-109(a)(3), it cannot shield the claim from the operation of the statute of repose in Tenn. Code Ann. § 36-2-306(a). Persons who are required to establish a child's parentage in order to recover for the provision of necessities to the child have "until three (3) years beyond the child's age of majority" within which to file suit. If they fail to file suit within this time for any reason, their right and remedy are foreclosed. Mr. Hooper filed suit ten years after Dana Hooper reached the age of majority. Therefore, his complaint was seven years too late and was subject to dismissal on that ground alone.

#### **IV.**

We affirm the dismissal of Mr. Hooper's damage claims against Mr. Moser and remand the case to the trial court for whatever further proceedings may be required. The costs of this appeal are taxed to Richard Hooper and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., J.